CHRONOLOGICAL STATEMENT

Petitioners have been, for varying periods of time, unlicensed seamen engaged in the maritime industry as members of the stewards' departments of west coast vessels. On June 19, 1952, an existing jurisdictional labor dispute of long standing culminated in a consent decree of the Court of Appeals for the Ninth Circuit entered in *N.L.R.B. v. Pacific American Shipowners Ass'n.*, docket No. 13,386 in the files of that Court. (R. 83-131.) This had the effect of suspending collective bargaining for the petitioners and other marine cooks and stewards on the west coast until certification of an exclusive collective bargaining agent by the National Labor Relations Board, which event occurred more than three years later. See particularly Appendix H to the Consent Decree. (R. 119, App. C, pp. 54-64.)

Instead of operating through the earlier hiring hall arrangement, the stewards department employees presented themselves to a central registration office established and operated under the consent decree by the various steamship companies through the Pacific Maritime Association, representing the employers who are respondents herein.

A referee was appointed by the Court to adjudicate grievances of the men as they arose, and no changes in wages, hours, and other working conditions could be instituted unless approved by the Court. Through the medium of the consent decree, the employers retained all of the benefits of availability of a skilled labor force which had been developed over years of

multi-employer bargaining. As had been the case in the past, some of the seamen remained in the employ of a single company for voyage after voyage of the same vessel; others worked for different companies on different vessels, for varying lengths of time.

Because collective bargaining was suspended, wages were effectively frozen; as time passed, despite some increases, petitioners' wages lagged farther and farther behind those of unlicensed personnel of the deck and engine room departments on the same vessels who enjoyed the benefits of collective bargaining, although previously there had been a long-standing parity in wages between the three departments in the industry. (See R. 67-75.)

As this disparity in wages developed during the period of the consent decree, petitioners were in effect forced to continue to "ship" at the existing rates, with the expectation, based on employer assurances, of recouping the interim loss in wages after certification of a collective bargaining agent.

After the collective bargaining agent ultimately certified failed to recover the differential between what petitioners actually received and what they would have received if the collective bargaining process had not been suspended during the effective period of the consent decree, petitioners decided to sue for those amounts. They predicated their claims on the fact that the consent decree arrangement was taken advantage of by the employers to withhold wage increases and other benefits. The decision to sue presented novel questions of law and procedure, including

the practical procedural problem of how most expeditiously and economically to present the many individual claims of the over 600 petitioners against the various respondent employers. One thing was clear: the basis upon which each seaman sought recovery involved identical questions of fact and law.

Four of the petitioners (John J. Rogers, Charles Mullen, W. A. Hopwood, Jr., and Herbert Patterson) were selected to be named libelants, the remaining petitioners being listed by name on attached exhibits. (R. 16, 19, 21.) (The number of named libelants could have been one or all of the petitioners; the number selected was purely for convenience's sake and was not intended to be legally significant.) These four were authorized in writing by the remaining 650-odd seamen to represent them. (R. 17.) All respondents were also joined in the same single libel, containing four counts, filed on February 8, 1956. (R. 1-16.) All respondents had participated in the central hiring office under the consent decree.

The first two counts sought recovery to each petitioner of the wages not paid but allegedly due during the moratorium period on alternative theories of *quantum meruit* and unjust enrichment. The contributions to welfare and pension trust funds allegedly due by the respondents as a part of the unpaid compensation were not recoverable individually, and therefore the four named libelants sought recovery, by way of class action in Counts III and IV, for the benefit of the entire class of stewards department em-

ployees who had worked during the moratorium period, numbering approximately 4,000, and not limited to those who had authorized the named libelants to present their individual wage claims. The recovery sought in Counts III and IV were payments directly to the funds. Petitioners have always contended that a class suit was the only method by which the welfare and pension trust funds could be repaid amounts due them, and based on the labor of all the beneficiaries.

In short, petitioners sought, by way of their representative and class counts and by joinder of all respondents, a consolidation at the pleading stage rather than the trial stage of many thousands of claims for separate voyages, yet all having their nexus in the common, underlying circumstances of the wage moratorium and involving common questions of law and fact.

In ruling on respondents' exceptions and exceptive allegations to this libel, then District Judge Hamlin indicated, in his order filed November 16, 1956 (R. 57-61), that there was a misjoinder of parties and causes as to the individual claims, and that under Local Admiralty Rule 7 each voyage was a separate transaction, requiring that each claim of each seaman be repleaded against a single respondent, except that seamen who had sailed on a common voyage could join those claims against the particular respondent involved. Judge Hamlin also ruled that class actions could not lie in admiralty and that Counts III and IV should be dismissed.

This ruling on joinder appeared to require up to 20,000 separate libels,[2] all of which could properly be consolidated.[3] To avoid this superfluous task, petitioners filed, prior to entry of a formal order, a motion to consolidate the separate claims without separately stating them formally. (R. 63-64.) This motion and a motion to reconsider (R. 62) were denied and the order to replead and of dismissal was entered on February 12, 1957. (R. 76-78; App. C, pp. 65-67.)

Petitioners appealed from this ruling. That appeal was dismissed by the Court of Appeals below on October 29, 1957, as premature, even as to Counts III and IV which had been dismissed for lack of admiralty jurisdiction. *Rogers v. Alaska Steamship Company,* 249 F.2d 646 (9th Cir. 1957). (App. C, pp. 68-78.)[4]

In their memorandum in opposition to respondents' motion to dismiss in *Rogers I,* petitioners, having construed the order of Judge Hamlin to require the filing of separate libels as to all but one of the four named libelants, argued that the order was in effect a judgment of dismissal as to all others in the pending libel. The Court of Appeals below, however, explicitly negatived this construction of the order, Circuit Judge

---

[2]Thus, assuming only 600 seamen who sailed on one voyage for each of the then 33 named respondents and that none of them had sailed on any of the relevant voyages together, approximately 19,800 separate libels could have been filed.

[3]Indeed, in the second appeal, the Court of Appeals below relied on the fact that the various causes could ultimately be consolidated as an argument against petitioners' contention that this construction of Judge Hamlin's ruling was unreasonable. See R. pp. 608-609, App. B, p. 21.

[4]Hereinafter referred to as *Rogers I.*

Lemmon stating that Judge Hamlin had "meticulously *instructed* them how to take their second bite at the forensic cherry." 249 F.2d at 648. On remand, therefore, petitioners concluded that their previous construction of Judge Hamlin's order to replead was erroneous and that what the order required was the statement of separate claims of each seaman against each respondent but *within the pending libel* in accordance (by analogy) with this Court's early opinion in *Oliver v. Alexander,* 31 U.S. (6 Pet.) 143, 148 (1832). The information necessary for compliance, in any event, required extensive detailed employment data which was extremely difficult to reconstruct from the scattered and fragmentary memories of the 650-odd petitioners. Accordingly, on March 1, 1957, petitioners propounded interrogatories to respondents to get the necessary information from their employment records. (R. 134-135.) (These were readily available because of the central registration office and hiring procedure in effect during the relevant period under the consent decree. See Appendix H of the decree at App. C, pp. 55-63.) Respondents' exceptions to the interrogatories were sustained by Judge Goodman on February 5, 1959, on the ground that no claims had yet been stated. (R. 158-161.)

As a substitute, petitioners then sought to set up a pilot case to test the substantive merits of the issues involved, with the remaining claims to be held in abeyance. This was done by filing a (First) Amended Libel on March 19, 1959, on behalf of one of the original named libelants, John J. Rogers, alone. (R. 166-176.)

This libel was confined solely to Rogers' individual wage claims against the respondent American President Lines, itemized as to various voyages for that company during the moratorium period. The class action counts were not repleaded.

On the same day, the other petitioners, including named and represented seamen in the original libel, moved to be joined or to intervene as parties. (R. 162-165.) Respondents opposed this motion, and on May 6, 1959, Judge Harris denied the motion (R. 179-180), considering himself bound by prior rulings, but reserved the right to consider Rogers' case as a pilot case at a pre-trial conference after the other petitioners had adequately stated their claims. (R. 575-576, 581.) Judge Harris extended time to file amended pleadings in order to allow petitioners time to secure the necessary information from the only other practical source, the United States Coast Guard office of the Merchant Vessel Personnel Division, in Washington, D. C. (R. 183-194; 195-196; 207.)

In connection with Judge Harris' ruling, one of counsel for petitioners made clear to him that petitioners' view was that they were to file amended pleadings *within the pending libel*, to which Judge Harris expressed his agreement. (R. 575-576.)

Further orders for extension of time to replead were granted, and a Second Amended Libel was filed on January 14, 1960 (R. 296-528) to which a supplement was filed on January 28, 1960. (R. 215-222.) This pleading stated, again by way of the common counts, the separate individual wage claims of all the

650 petitioners save Rogers, set forth in detailed attached schedules (Exhibits A-III) which listed the specific voyages on which each seaman had served, on specifically named vessels, operated by the respective respondents. (R. 302-528.) The class action counts were not repleaded.

Respondents moved to dismiss this libel on the ground that it did not comply with previous orders. (R. 213-214.) Judge Goodman dismissed the Second Amended Libel on February 10, 1960 for improper joinder of parties and causes of action and for failure to tender claims "in the manner prescribed by previous orders." (R. 226-229; App. B, p. 31.)

Petitioners appealed from Judge Goodman's judgment of dismissal of the Second Amended Libel, and from Judge Hamlin's original order to replead and judgment of dismissal of the original class action counts.[2] In the meantime, the severed individual claims of Rogers were pursued. While *Rogers II* was pending, Judge Wollenberg, on May 31, 1960, sustained respondent American President Lines' exceptions to the (First) Amended Libel, on the grounds, in essence, that the common counts do not satisfy Admiralty Rule 22, at least where there exist written articles and releases executed pursuant to 46 USC §§ 564, 644. (R. III, 17-20.) Rogers elected to stand on his pleadings, which included his verified Reply to Exceptive Allegations (R. III, 12-16), and the (First)

[2] This was docketed in the Court of Appeals below as *Rogers v. Alaska Steamship Company*, No. 16,862, and is referred to hereinafter as *Rogers II*.

Amended Libel was dismissed on September 2, 1960. (R. III, p. 35.) A third appeal was taken from this judgment,[6] and the Court below affirmed (June 5, 1961), ... F.2d ..... (App. B, pp. 25-31.)

Since *Rogers II* and *Rogers III* were merely two parts of the same case, petitioners sought in the Court below to have the two appeals consolidated on October 19, 1960. This motion was denied by the Court of Appeals below on October 27, 1960, and the two appeals were pursued independently.

On January 27, 1961, the Court of Appeals entered its judgment in *Rogers II* affirming the dismissal by Judge Goodman, and holding that petitioners could not now question the validity of Judge Hamlin's order. It held further that the dismissal was proper as to the remaining original named libelants (Mullen, Hopwood and Patterson). The Court of Appeals held, however, that the dismissal as to the other 650-odd petitioners, (being the seamen named on the exhibits to the original libel) was not an adjudication on the merits and therefore they might further pursue their claims "in any independent suits which they may see fit to institute." (R. 607, App. B, p. 19.) The Court of Appeals refused, however, to indicate whether such future suits would be subject to a defense of laches. (R. 607, App. B, p. 19.)

The opinion of January 27, 1961, although mentioning them as one of the issues on appeal failed to

---

[6]This appeal was docketed in the Court of Appeals below as *Rogers v. American President Lines*, No. 17,110, and is hereinafter referred to as *Rogers III*.

discuss further the class action counts of the original libel. A petition for rehearing was filed on February 24, 1961, which raised this omission and other matters. The petition for rehearing was denied on April 4, 1961, with a supplemental opinion disposing of the class action on the basis that none of the original libelants nor the others originally represented had present standing to establish their claims. (R. 612-613, App. B, pp. 22-24.)

On June 5, 1961, the Court of Appeals for the Ninth Circuit filed its decision in *Rogers III*, upholding Judge Wollenberg's dismissal of the (First) Amended Libel of Rogers on the ground that Admiralty Rule 22 of this Court precludes the use of the common counts in admiralty when shipping articles and releases are executed. Articles and releases for each voyage made by a seaman are required by statute, are primarily for the benefit of the seaman, and, according to petitioners, were never intended to define their compensation for work done, a function usually of the collective bargaining agreement.

This consolidated petition seeks review of the decisions of the Court of Appeals in *Rogers II* and *Rogers III*.

REASONS FOR GRANTING THE WRIT

A common thread runs through the decisions of the lower Courts in this case. This thread is a preoccupation with Procrustean technicalities, and a re-

fusal to accommodate adjective law to impelling realities. The more than 600 seamen who sought the assistance of admiralty in recovering wages rightfully due them find themselves before this Court more than five years after their suit was commenced without yet having opened the door to a determination of the substantive merit of their claims.

When the reason for such an impasse is quite simply what would appear to be a determined hostility on the part of the lower Courts to long-accepted admiralty principles, it would seem that the occasion has arisen for the exercise by this Court of its supervisory jurisdiction over the lower Courts.

Ever since the claimants here filed their original libel on February 8, 1956, there has been no genuine doubt concerning the nature of their claims, the manner in which the wages and welfare and pension fund payments claimed to be due them should be computed, and the theory upon which they sought recovery. The original libel covered all of these essential elements of a cause of action. Yet, at every step of the case, libelants have been thwarted in their attempt to have their claims adjudicated on the merits.

Libelants sought to review the initial determination of Judge Hamlin that each voyage constituted a separate transaction within the meaning of the admiralty rules concerning joinder. They were told by the Court of Appeals that this attempt to review was premature, and that they should replead. When they did so finally, after several attempts to persuade the

District Court that a separate statement of each seaman's claim would simply burden the files of the Court with mountains of paper, they found themselves then confronted with a dismissal because they had not pursued a course suggested by Judge Hamlin as an alternative course only. In short, when libelants finally did separately state by each voyage the thousands of claims which existed as a result of their underpayment, they were told that this was improper. The reason given was that they had not complied with Judge Hamlin's order; yet, Judge Hamlin's order would have required them to combine the separate claims per voyage finally stated in a fashion wholly unnecessary for clarity and wasteful of time and effort once separate statements of each claim were determined upon.

Only the common thread of slavish adherence to technicalities explains other actions of the Courts below. One of the main questions on appeal in *Rogers II* was whether a class action would lie in admiralty, and thus permit the repayment to the welfare and pension funds of the sums due under libelants' theory of the case. The Court of Appeals did not even discuss this question in its opinion in *Rogers II*. When this was pointed out on petition for rehearing, the question was again not discussed on its merits, but determined to be moot because the pleadings on the first two counts of the libel were found defective on wholly procedural grounds. Surely such an abdication of appellate responsibility by a Court of appeals merits

an exercise by this Court of its supervisory jurisdiction.

As we have already pointed out, libelants sought to review Judge Hamlin's ruling that each voyage constituted a single transaction. The appeal from this ruling was dismissed as one from a non-appealable order, and the Appellate Court directed libelants to replead. There was no intimation in the opinion in *Rogers I* that such a course would waive libelants' right at a later stage to have appellate review of Judge Hamlin's order. Yet, when Judge Goodman's judgment of dismissal was appealed, libelants learned that they had forfeited their right to review Judge Hamlin's order because they had obeyed the directions of the Court of Appeals when their appeal was dismissed in *Rogers I*. This alone would merit a review by this Court.

But the circle of frustration was not yet complete. This was accomplished by the opinion in *Rogers III*. Having been taught by the Court of Appeals in *Rogers II* that to amend one's pleadings waives one's right to test the validity of the original pleading, libelants appealed the ruling of Judge Wollenberg that the common counts did not lie in admiralty. Again, in *Rogers III* the Court of Appeals upheld the ruling of the district judge. Instead of remanding the case to the District Court to give libelants a new opportunity to replead, the Court of Appeals affirmed the dismissal below and threw libelants out of Court entirely. The Appellate Court thus abdi

cated completely its responsibility to help minimize the danger of any fatal consequences flowing from a wrong choice by a litigant, especially in an area yet relatively uncharted in admiralty practice. Such a "damned-if-you-do-and-damned-if-you-don't" approach is alien to admiralty and its treatment of seamen. When it is manifested as thoroughly as it has been in this case, the time has come for this Court to order a halt.

Let us briefly consider the specific questions presented. Petitioners maintain that class actions may lie in admiralty. The District Court dismissed Counts Three and Four of the original libel on the ground that express authority for a class suit in admiralty had not been shown, and also because there were cases which "negate(d) any such procedure." (R. 60.) Petitioners sought vainly, in *Rogers I* and *Rogers II*, to demonstrate to the Court of Appeals below that the cases relied on by the District Court were erroneously interpreted and moreover inapposite. The cases relied on by the District Court, *The Roosevelt* (D.C.S.D.N.Y. 1938), 23 F.Supp. 620; *Totolos v. Compania de Navegacion Cristobal* (D.C. S.D. N.Y. 1950), 94 F.Supp. 699, and the *Nico* case (D.C. Va.) 1951 A.M.C. 1190, involved cases for direct payment of wages to seamen, and not a class action for recovery of a trust fund. In the *Nico* case, moreover, it is expressly noted that no case was made for a class action and in the *Totolos* case it is emphasized that there was no allegation of a common

fund. Thus both cases, instead of negating the propriety of a class suit in admiralty, actually implicitly recognize that a class suit would be permissible given a proper case.

The fact that none of the lower Courts ever discussed this point is a demonstration of an unwillingness to face the realities of the situation which characterized the treatment of these claims at all stages of the case.

Recognizing that no General Admiralty Rule yet exists analogous to Rule 23 of the Federal Rules of Civil Procedure, petitioners urge that the same considerations which earlier resulted in equity's avoidance of the common law restrictions on class suits apply in admiralty with equal force and validity, to avoid injustice to numerous small claimants who, as representatives of an ascertainable class of seamen, seek to assert a "common" right and to recover monies for common funds.

On the issue of joinder of representative suits for seamen's wages, petitioners again were faced with procedural roadblocks due to narrow interpretation. Because the labor-management situation here presented was a novel one, and because it affected all petitioners in a substantially identical manner, petitioners attempted joinder of causes and parties on the basis of a broad interpretation of local Admiralty Rule 7(a). (Appendix A, p. 2.) Petitioners contended that the term "transaction" in said rule be deemed to encompass as one transaction the entire

course of dealings between the shipowner respondents and the stewards department personnel during the period of the Consent Decree. Then District Judge Hamlin ruled, however, that since wage claims have been traditionally based on voyages, each voyage created a separate claim constituting in turn a separate cause of action, thus precluding joinder except under very limited conditions, namely where seamen serve together on the same voyages.

The District Court was not persuaded that General Admiralty Rule 44 permitted the adaptation of local practice to cope with the novel circumstances of this case. Petitioners have already indicated in their Statement of the Case how this would have created an unnecessary and burdensome pleading problem. When petitioners attempted to have the Appellate Court review this point, they were twice thwarted. The Court of Appeals first (in *Rogers I*) ruled the appeal premature, while at the same time chiding petitioners for failing to observe that the opportunity to replead had been expressly afforded them.

Then, after petitioners separately stated their respective claims by way of the Second Amended Libel, they were dismissed with prejudice. When they again questioned the trial Court's ruling on misjoinder of parties and causes of action, the Court of Appeals swept the issue aside, stating that petitioners had waived the original point by repleading, thus completely ignoring the fact that it had earlier directed the repleading!

The intervention of this Court is impelled by the necessity to demonstrate to the lower Courts that admiralty practice and procedure can be flexible and non-technical enough, even in the absence of an express rule, to cope with new circumstances and problems presented by modern mass situations, at least to an extent equal to the analogous Rules of Civil Procedure. (Compare with this Court's new and amended Rules of Practice on discovery, April 17, 1961, subsequent to the decision in *Miner v. Atlass,* 363 U.S. 641.)

Petitioners stated their wage claims in both the First and Second Amended Libels in the form of common counts, relying upon this Court's opinion in *Archawski v. Hanioti,* 350 U.S. 532, and that of the Court of Appeals for the Second Circuit in *Martin v. Campanaro,* 156 F.2d 127, cert. den. 329 U.S. 759.

In response to exceptive allegations to the First Amended Libel, libelant Rogers filed a verified reply which, *inter alia,* refuted the contentions that the written shipping articles and statutory releases barred the wage claims.

The District Court sustained the exceptions, firstly on the basis that General Admiralty Rule 22 precluded a statement of claim by way of the common count, and secondly that the articles and releases barred recovery unless libelant stated "facts which would warrant disregard" of the written instruments.

Petitioners attempted to demonstrate to the Court below that the articles are not, under modern conditions of collective bargaining, the meaningful contract as to wages. Petitioners here relied upon this Court's opinion in *National Labor Relations Board v. Waterman SS Co.*, 309 U.S. 206, 212-213, which discusses the statutory requirements for such documents in the light of modern collective bargaining practices. However, the dismissal of the Rogers libel was affirmed by the Court of Appeals (in *Rogers III*) in an opinion which takes for granted that the shipping articles were the controlling contract of employment. The Court below completely ignored the *Waterman* case, and erred in presuming that shipping articles are inviolate. The Court below also failed to recognize the fact that 46 U.S.C. §597 authorizes the setting aside of seamen's releases. In effect, in throwing out the libel on the ground that insufficient facts had been pleaded, the Court of Appeals refused as a matter of law to permit the wage claims to be heard on the merits. Petitioners submit that Admiralty Rule 22 must be construed in the light of *Archaiwski v. Hanioti,* and if the common counts may state a cause of action in admiralty, the pleading requirement has been sufficiently met, leaving the fact determination to be made ultimately in the trial on the merits.

Judge Hamlin's order of February 12, 1957, directing separate statements of the wage claims failed to clarify whether the claims could be so stated within

the confines of the pending libel or whether many new libels would be required. The petitioners herein, who include not only the named libelants in the original libel filed February 8, 1956 but also the approximately 650 other seamen who first appeared in a representative manner on exhibits to the original libel, ultimately stated their separate claims by voyage, dates, employment rating, and separately named employer respondents in the Second Amended Libel. The dismissal of the Second Amended Libel for allegedly running counter to previous orders of the District Court was affirmed by the Court of Appeals, which ignored the obvious fact that in order for there to be a non-compliance with previous Court orders, the latter ought to be not only clear but consistent. Unfortunately, they were neither, let alone being free from error. Petitioners have consistently attempted in good faith to state their respective wage claims in order that the merits of those claims could ultimately be reached at a trial on the facts. A mere reading of the case chronology establishes this good faith effort. Petitioners may have misread the previous orders calling for repleading, but they ought to be excused in such misinterpretation where even the District Court judges treating with those orders (at least three such judges were involved in such interpretation), viewed the problem in contradictory fashion,[7] sufficiently so that a dismissal with prejudice under

---

[7]See colloquy between Judge Harris and one of counsel for libelants, R. 575-576.

such circumstances is more than an abuse of discretion; it is a deprivation of due process under the Fifth Amendment.

Because of the importance of this case in terms of admiralty practice and procedure, this Court should intervene to correct error below.

CONCLUSION.

For the foregoing reasons this consolidated petition for writ of certiorari should be granted.

Dated, August 23, 1961.

ALLAN BROTSKY,
RUBIN TEPPER,
McMURRAY, WALKER & TEPPER,
RICHARD A. BANCROFT,
Counsel for Petitioners.

(Appendices A, B and C Follow)

[General Admiralty Rules]

Rule 22. (Requisites of libel in instance causes.)

All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises.

Rule 44. (Right of trial courts to make rules of practice.)

In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of

justice, provided the same are not inconsistent with these rules.

[Local Admiralty Rule]

Rule 7. (Joinder and Intervention.)

(a) Parties may sue and parties, including a res, may be sued either jointly, severally or alternatively in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transaction.

(b) Persons who, under paragraph (a), might have joined as co-libelants, persons entitled to participate in the recovery; and, in suits for wages, any other seamen claiming wages for the same voyage, not made parties in the original libel, may be admitted, upon petition, to prosecute as co-libelants upon such terms as the Court may deem reasonable.

[Federal Rules of Civil Procedure]

Rule 23. (Class Actions.)

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce

that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[United States Constitution]

Amendment V—(Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.)

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Appendix B

United States Court of Appeals
for the Ninth Circuit

John Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 16,862 Jan. 27, 1961

Appeal from the United States District Court for
the Northern District of California
Southern Division

Before: Hamley, Jertberg and Koelsch,
Circuit Judges

Hamley, Circuit Judge:

This is a suit in admiralty brought by and on behalf of seamen to recover additional wages and contributions to certain trust funds on the alternative theories of quantum meruit or unjust enrichment. The district court entered a final decree severing the claim of one of the libelants and dismissing the action as to all other libelants. The latter now appeal, raising questions concerning abuse of discretion in dismissing the second amended libel, the necessity of findings of fact and conclusions of law, the joinder of parties

and causes, and the appropriateness of class suits in admiralty.

This case is an outgrowth of labor conditions which existed in the maritime industry on the west coast from June 19, 1952, through mid-October 1955. Immediately preceding June 19, 1952, the National Union of Marine Cooks and Stewards was recognized by the Pacific Maritime Association[1] as the exclusive bargaining representative of the unlicensed personnel serving in the various stewards departments of west coast vessels. For the forty-month period beginning June 19, 1952, however, these employees were hired and worked pursuant to the terms of a consent decree of this court.[2]

During this period the collective bargaining process was suspended. The purpose was to withhold collective bargaining until the National Labor Relations Board certified a union as the exclusive representative for collective bargaining purposes. Instead of operating through the earlier hiring hall arrangement, the stewards department employees presented themselves to a central registration office established and operated by the steamship companies. These employees were there registered and dispatched to jobs on the vessels of the various participating employers.

---

[1]Pacific Maritime Association represented the steamship companies which are the respondents and appellees in this action.

[2]The consent decree was entered in N.L.R.B. v. Pacific American Shipowners Ass'n, docket No. 13,386 in the files of this court. An unrelated matter dealt with by this court in that case is reported in 218 F.2d 913.

Libelants allege that the consent decree arrangement was taken advantage of by the employers to withhold wage increases and other benefits to which libelants claim they are entitled. This contention is predicated upon a comparison between the treatment accorded them during this interim period with that which they claim was accorded the personnel of other departments with which there had formerly been parity.

Seeking a remedy, John J. Rogers, Charles Mullen, W. A. Hopwood, Jr., and Herbert Patterson, suing on behalf of themselves and others, filed a libel in admiralty against thirty-three employer respondents. The libel, which was filed on February 8, 1956, was stated in four counts.

The purpose of the first two counts was to obtain a monetary recovery for the individual libelants and for each of 275 other seamen whom they purported to represent. Such recovery was to be measured by the difference between the wages and other benefits which each had received during the forty-month period and the reasonable value of their respective services during that period. It was libelants' theory that this difference is reflected in the percentage increases and benefits which were paid to the unlicensed deck and engine room personnel aboard the same vessels during the relevant period. The first count was grounded on an implied-in-fact quantum meruit theory; the second was alternatively based on an unjust enrichment, implied-in-law theory.

In the third and fourth counts the four named libelants sought to state a class action on behalf of themselves and some 4,000 seamen similarly situated. The purpose of these counts was to obtain recovery for the benefit of a stewards department health and welfare trust fund and a stewards department pension trust fund with respect to the contributions allegedly due and unpaid from the thirty-three respondent steamship companies. The third count was based on a quantum meruit theory; the fourth was alternatively based on an unjust enrichment theory.

Exceptions were filed by certain respondents alleging procedural and substantive defects in the libel described above. The district court dealt with these in an order filed on November 16, 1956.

As to counts one and two, the procedural exceptions were directed to an alleged misjoinder of the four named libelants, thirty-three respondents, and causes of action, and the asserted impropriety of the four named libelants representing other seamen. By this time the number of seamen whom the four libelants sought to represent in the first two counts had grown from 275 to about 400, and was ultimately to reach 650.

Concerning the misjoinder question, the district court referred in its opinion and order to rule 7(a), Local Admiralty Rules, United States District Court, Northern District of California, where the libel was filed. It is provided therein that parties and causes of action may be joined "if the causes of action in-

volve substantially the same questions and arise out of the same transaction."

The court held that in so far as the first two counts were concerned, each voyage was a separate transaction between a seaman and the ship owner. It was therefore concluded that the causes of action stated in those counts did not arise out of the same transaction; therefore joinder of the four named seamen, the thirty-three respondents, or the causes of action was precluded.

With regard to the question of whether the four named libelants could represent several hundred others, the court noted in its order of November 16, 1956; that the four had written authorizations from the 650. It was therefore held that the suit could be brought on behalf of the other seamen "if the named libelant and those from whom he has such written authority sailed on the same voyage or voyages together."

Based on these and other conclusions of law stated in the order of November 16, 1956, it was therein ordered that counts three and four of the libel be dismissed. As to counts one and two, it was ordered that the causes of action of each of the four named libelants be completely severed, and that directions be given as to how the parties and causes of action could be joined in an amended libel. The court also directed that a further order be prepared to evidence these rulings.

Motions for reconsideration and for consolidation of causes of action were thereafter made. On Feb-

ruary 12, 1957, an order was entered denying these motions and confirming and formalizing the rulings contained in the opinion and order of November 16, 1956. Counts three and four were dismissed, and as to counts one and two it was ordered

> ". . . that the exceptions of said respondents, with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same hereby are sustained; that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to represent in this action, but not otherwise . . ."

Libelants appealed from the order of February 12, 1957. On March 1, 1957, while this appeal was pending, libelants filed and served interrogatories directed to each of the respondents.[3] Several of the respond-

[3]The interrogatories were as follows:

"1. State whether, as to each libelant herein and each person named in Exhibit A to the libel herein, as supplemented through October 25, 1956 (some 600 seamen) such person was employed in the stewards department of any vessel owned,

ents filed objections to these interrogatories, but no action was taken thereon during the pendency of the appeal. On October 29, 1957, the appeal was dismissed on the ground that the order of February 12, 1957, was not a final order. Rogers v. Alaska Steamship Co., 9 Cir., 249 F.2d 646.

There ensued a period of settlement negotiations which eventually proved fruitless. During this period orders were entered on five different occasions giving libelants additional time in which to file amended pleadings. The objections to the interrogatories were then brought on for hearing. The principal objection made by respondents was that the interrogatories were premature inasmuch as there was then no libel on file in which any specific claim was asserted against any of the respondents.

Libelants resisted this objection by asserting that they were unable to file amended pleadings in accordance with the order of February 12, 1957, until they had the information sought by the interrogatories. They further asserted that the interrogatories afforded the only practical means of obtaining the information.

---

chartered, managed, operated, navigated or controlled by you during the period from June 19, 1952 through October 15, 1955.

"2. If, as to any such person, the answer to the preceding interrogatory is in the affirmative, state as to each such person

(a) the name of the vessel on which employed,

(b) the voyage number or numbers during which employed,

(c) the period or periods during which employed for each voyage number or numbers, and

(d) the job classification in the stewards department for which employed for each such voyage."

On February 5, 1959, the district court entered an order sustaining the objections to the interrogatories. In the same order libelants were given twenty days in which to file amended pleadings subject to modification upon a showing of good cause.

On March 19, 1959, John J. Rogers, one of the four original libelants, filed an amended libel on his own behalf only and against respondent American President Lines, Ltd., only. Eighteen counts were stated, two each with respect to nine separate voyages of a steamship operated by that respondent. The amended libel filed by Rogers was thereby in effect severed from all other parties and causes of action involved in the original suit and thereafter proceeded on its separate way. It is sufficient to note that the second amended libel of Rogers was thereafter dismissed and an appeal from the order of dismissal is now pending in this court in docket No. 17,110.

On the same day that Rogers filed his amended libel the 650 seamen whom the four original libelants had sought to represent in counts one and two of the original libel joined in a motion for leave to become parties libelant, or in the alternative to intervene as parties libelant in the initial proceeding. The alleged purpose in making this motion was to permit the Rogers libel to proceed as a "pilot" case to be heard on the merits. The motion was denied, after hearing, on May 6, 1959.

In the order of denial libelants other than Rogers were given until September 1, 1959, to file amended pleadings "in conformity with the . . . orders of No-

vember 16, 1956, February 12, 1957, and February 5, 1959." It was provided that no modification of the previous orders was intended; the right to obtain a pretrial conference was preserved. The order expressly stated that it was without prejudice to any defenses which any respondent might have.

On July 17, 1959, the district court entered an order requiring the San Francisco office, Merchant Vessel Personnel Division, United States Coast Guard, to furnish certain information to the proctors for libelants.[4] On August 31, 1959, libelants, except Rogers, were granted a further extension of time to November 1, 1959, within which to file amended pleadings.

Libelants thereafter moved once more for an extension of time within which to file amended pleadings. After hearing, an order was entered on December 30, 1959, extending such time to January 15, 1960. Consistent with the order of May 6, 1959, it was provided in this order that the amended pleadings were to be "in strict conformity to and compliance with" the orders of November 16, 1956, February 12, 1957, and February 5, 1959, that no modification of those orders was intended, and that the extension of time was without prejudice to any defense any respondent might have. This extension order also expressly provided that no further extension would be granted and

---

[4]The information to be furnished was of the same general character as that sought to be elicited by the interrogatories. See footnote 3. Such information was required as to each seaman from whom the proctors had written authorization.

that if amended pleadings in strict conformity with prior orders were not filed by January 15, 1960, the suit would be subject to dismissal.

On January 14, 1960, a second amended libel in personam was filed. In this pleading the 650 seamen whom the four original libelants had sought to represent in counts one and two of the original libel were themselves named as libelants, and of the original four libelants only Rogers was named as a party. Two of the original libelants, Mullen and Hopwood, were thereafter named as libelants in a supplement to the second amended libel filed on January 28, 1960.[5]

This amended pleading also named sixty-six respondents, only twenty-three of whom were named as respondents in the original libel. This amended pleading restates only the claims set out in the first and second counts of the original libel. It pertains to numerous voyages over a period of three years, specifically enumerated in schedules attached to the amended pleading.

The district court heard argument on exceptions filed against the amended pleading. As a result, that court on February 16, 1960, entered a final decree in admiralty severing the individual claims of Rogers, and dismissing the actions as to the remaining causes

[5]Mullen's claims, as listed in this supplement, related to nine voyages on vessels operated by three different respondents. Hopwood's claims related to ten voyages on one vessel operated by one respondent.

of action against all respondents. The reasons for the dismissal, as recited in this decree, are quoted in the margin.[6]

The four original libelants, in their own behalf and on behalf of the other 650 seamen, have appealed. They challenge the validity of the decree of February 16, 1960, and the previous orders adverse to them, particularly the order of February 12, 1957. Concerning the decree of February 16, 1960, it is first argued that the district court abused its discretion in dismissing the second amended libel. Three reasons are advanced in support of this contention, the first being that the district court erred in its interpretation of the previous orders of the court.

As indicated by the recitals contained in the decree of February 16, 1960, quoted in part in footnote 6, the district court held that the second amended libel did not comply with the directions contained in pre-

---

[6] "The Second Amended Libel filed on January 14, 1960, does not tender any claims by the original four libelants either in their own behalf or in a representative capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants some 600 seamen whom the four original libelants had previously sought to represent and names as respondents many shipping companies not heretofore named.

"Thus the Second Amended Libel not only improperly joins causes of action arising out of unrelated contracts of employment, but also comes too late. All of the information required to present the claims of the 600 seamen as they are now presented has been available in the records of the Coast Guard since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libellants have been apprised of the limitations inherent in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel in their own behalf."

vious orders of the court. This noncompliance, the district court indicated, resulted from the lateness of the amended pleading and from the fact that the amended pleading (1) did not tender any claims in the manner prescribed by previous orders, (2) named as libelants some 600 seamen whom the four original libelants had previously sought to represent, and (3) named as respondents many shipping companies not theretofore named.

In order to determine whether the district court thereby misinterpreted previous orders of the court, it is necessary to review the provisions of previous orders with regard to each of the three matters noted above. Concerning the first of these, the basic previous order to be considered is that of February 12, 1957. In that order, quoted in part at an earlier point in this opinion, directions were given as to how the original libelants would be permitted to tender claims in an amended pleading, "but not otherwise."

The order of February 12, 1957, contemplated that only the original four libelants could file amended pleadings. Only one of them, Rogers, was named in the second amended libel filed on January 14, 1960. As previously noted, however, he was then proceeding separately and asserted no claim in this amended libel. Two of the original libelants, Mullen and Hopwood, were named in a supplement to the second amended libel filed on January 28, 1960. This supplement, however, was filed thirteen days after the final deadline for the filing of amended pleadings, as set in the order of December 30, 1959. It was filed three days

after respondents had filed a notice of motion and motion to strike and dismiss the second amended libel.

The order of February 12, 1957, also contemplated that the causes of action of each of the four named libelants should be completely severed, both as among themselves and as to each respondent, with exceptions to be discussed below. In the second amended libel, as supplemented, however, the causes of action of the two original libelants still in the case[7] were not completely severed, either as between themselves or as to individual respondents.

They were not completely severed as between themselves because the only two remaining original libelants, Mullen and Hopwood, were joined as libelants in the same amended libel. The fact that in this pleading it was requested that the claims of individual libelants be regarded as separate causes of action did not effectuate a complete severance as to such libelants. Such a severance could be accomplished only by filing separate amended libels.

The causes of action were not completely severed as to individual respondents because sixty-six respondents are named in the second amended libel. One of these was named in connection with libelant Hopwood's claims and three others were named with respect to libelant Mullen's claims.

Nor is the failure to completely sever the causes of action as to libelants and respondents excused under

[7]This is on the assumption that Mullen and Hopwood were still in the case despite the tardy inclusion of their names in the second amended libel.

either of the exceptions provided for in the order of February 12, 1957. The first exception permits two or more of the original libelants to join their claims against any one respondent with respect to one or more voyages on which they served together. But in the second amended libel, as supplemented, Mullen and Hopwood do not assert any claims against the same respondent.

The second exception permits any of the four original libelants to sue with respect to one or more voyages on behalf of himself and those with whom the libelant sailed on the same voyage or voyages and from whom such libelant has written authority. But in the second amended libel, as supplemented, neither Mullen, Hopwood, nor any other named libelant purports to sue on behalf of any other seaman.

We conclude that in holding in its decree of February 16, 1960, that the second amended libel does not tender any claims in the manner prescribed by previous orders, the court did not misinterpret the previous orders of that court.

We reach the same conclusion with respect to the holding of the court that noncompliance with previous orders was manifested by the inclusion in the second amended libel of 650 libelants not previously named, and numerous respondents not previously named.

In its order of May 6, 1959, the district court had denied a motion made on behalf of these 650 seamen that they be granted leave to become parties libelant, or in the alternative to intervene as libelants. The

attempt in the second amended libel to add these 650 seamen as parties libelant was in complete disregard of this order of denial and constituted noncompliance therewith.

No order was ever sought or obtained granting leave to add as parties respondent any of the respondents whose names appear for the first time in the second amended libel. Absent such an order the inclusion of these new respondents constituted noncompliance with the order of February 12, 1957. It also constituted noncompliance with the order of December 30, 1959, which required that amended pleadings be in strict conformity to and compliance with the order of February 12, 1957, and other orders.

We therefore hold that in so far as the decree of February 16, 1960, represents the district court's interpretation of previous court orders that court did not err or abuse its discretion.

Appellants argue that the district court abused its discretion in holding in the decree of February 16, 1960, that the 650 seamen were "too late" in asserting their claims in the second amended libel. Under all the circumstances recounted above, we believe that this was an appropriate conclusion in so far as participation in the instant action is concerned. But whether it is or not, the noncompliance with previous orders, as discussed above, provided adequate ground for the decree of dismissal.

Appellants also contend that the district court abused its discretion in failing to provide in the de-

cree of February 16, 1960, that the dismissal did not constitute an adjudication on the merits. The decree is final in form and it is appropriately so with regard to the four original libelants.

However, with regard to the 650 seamen named libelants in the second amended libel, the decree cannot be regarded as an adjudication on the merits, whether or not that was intended by the district court. As to them the second amended libel was properly dismissed because they had never been granted leave to join in the action and because the attempted joinder was counter to previous court orders. But since these 650 seamen were thus without standing in the action, the district court could not have adjudicated the merits of their claims by foreclosing future suits on the ground of staleness. If the claims of these seamen are stale that defense will have to be presented in any independent suits which they may see fit to institute.[8]

Aside from the question of abuse of discretion, appellants challenge the decree of February 16, 1960, on the ground that it should have been but was not supported by findings of fact and conclusions of law. In

---

[8]Appellees do not seem to contend that the decree of February 16, 1960, constitutes an adjudication on the merits as to the 650 seamen. They argue only that "assuming the dismissal below has this effect" these seamen have not been prejudiced. This argument goes: ". . . if the attempt by appellants to present their claims in their own capacity in this action is too late, any effort by them to commence an entirely new action would *a fortiori* be too late. . . ." We express no view as to this.

advancing this argument appellants rely upon Admiralty Rule 46½, 28 U.S.C.A.[9]

There were no facts to be found in connection with any matter which was before the court when the final decree of February 16, 1960, was entered. That decree involved no adjudication of fact but only questions of law. In civil proceedings no findings of fact would be required under these circumstances. Thomas v. Peyser, D.C.Cir., 118 F.2d 369, 374. We think the same rule applies by analogy in suits in admiralty.

The decree of February 16, 1960, is also challenged as giving finality to previous orders contended to be erroneous in which exceptions to counts one and two of the original libel were sustained and counts three and four were dismissed. As previously noted, an earlier attempt to reverse these other orders was rejected by this court as premature. The prior order to which attention is principally directed is that of February 12, 1957, described above. Appellants question the trial court's rulings evidenced by that order, that the original libel involves a misjoinder of parties and causes of action and an impermissible attempt to state a class action.

The fact which is controlling here is that the parties did not choose to let that order go to final judg-

---

[9]Rule 46½:

"In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49."

ment. Instead, they elected to amend. Having done so, the second amended libel was substituted in all respects for the original, and complaint may not now be made of the order which required the amendment. Studio Carpenters Local Union No. 946 v. Loew's, Inc., 9 Cir., 182 F.2d 168, 170.

The directions relative to the form of amended pleadings contained in the order of February 12, 1957, authorized joinder of libelants to the extent they were employed on the same voyage. Had amended libels consistent with these directions been filed, it is likely that the number of suits would have been further reduced by orders of consolidation. This would have been possible to the extent that similarity of claims and defenses permitted consolidations under Local Admiralty Rule No. 14.[10] Had this course been followed, the number and size of the lawsuits growing out of this controversy could have been held within reasonable bounds.

The decree of February 16, 1960, and all previous orders which were thereby made final are

Affirmed.

(Endorsed) Opinion Filed Jan. 27, 1961.

Frank H. Schmid, Clerk.

---

[10]Rule 14 reads:

"When various suits are pending, all resting upon the same matter of right or defense, even though there is no common interest between the parties, the Court may order the suits to be tried together, and may order a single decree or decrees in each cause."

United States Court of Appeals
for the Ninth Circuit

John J. Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 16,862 April 4, 1961

On Petition for Rehearing

Before: Hamley, Jertberg and Koelsch, Circuit Judges

Per Curiam:

An opinion affirming was filed herein on January 27, 1961. Appellants have petitioned for rehearing, contending among other things that we should have dealt on the merits with the class action aspect of this case. As we stated in the opinion of January 27, 1961, class actions were pleaded in the third and fourth counts of the original libel. These counts were dismissed by orders of November 16, 1956, and February 12, 1957. Appellants argued that this was error.

We did not deal on the merits with the initial dismissal of any of the four counts of the libel, holding that libelants did not stand thereon but elected to amend. With regard to counts three and four, in which class actions were sought to be stated, a further explanation is appropriate.

The claims stated in these counts sought recovery for the benefit of a stewards' department health and welfare trust fund and a stewards' department pension trust fund. These are common funds of which stewards' department employees and their families are the sole beneficiaries. The relief sought under counts three and four was to require appellees to contribute to those trust funds a percentage of the additional wages to which members of the class would be entitled under the theory advanced in support of the individual wage claims asserted in the first and second counts of the libel.

The basic premise of the class counts, therefore, is that the four original libelants and the 4,000 additional seamen they sought to represent were entitled to additional wages on the theory advanced in counts one and two of the libel. There is no contention that appellees have failed to add to the trust funds the required percentage of such wages as they concede were earned. The quarrel is not over failure to comply with the trust arrangements, but over the question of what wages were earned by individual members of the class. Thus the issue presented is precisely the same under the class counts as under counts one and two, i. e., the alleged right to additional wages.

But except for John Rogers, one of the original libelants whose claim has now been severed from this proceeding, none of the original libelants or the 4,000 other seamen they seek to represent has present standing to establish a claim for such additional wages. The three remaining libelants (other than

Rogers) and the 650 seamen they sought to represent in counts one and two do not have such standing because they elected to amend their libel with regard to their claims for wages and did so in a manner which was ineffective. The remainder of the 4,000 seamen sought to be represented in the class counts have never had such standing, since the class counts did not purport to assert wage claims.

Since members of the class have either not asserted wage claims or have not done so effectively, the underlying premise upon which the class counts are based cannot be established. It would be a curious anomaly if these 4,000 seamen, while unable to establish through a class action or otherwise their right to additional wages, could nevertheless require appellees to contribute a percentage of such wages to the trust funds in question.

For this reason, if for no other, the district court's order dismissing the class counts must, under the present posture of the case, be sustained.

The petition for rehearing is denied.

(Endorsed) Per Curiam Opinion on Petition for Hearing Filed April 4, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

John J. Rogers, Appellant, vs. American President Lines, Ltd., Appellee.	No. 17,110 June 5, 1961

Appeal from the United States District Court for the Northern District of California Southern Division

---

Before: Hamley, Jertberg and Koelsch, Circuit Judges

Hamley, Circuit Judge:

In this amended libel in personam brought against American President Lines, Ltd., John J. Rogers seeks to recover compensation additional to that he has already received for services rendered to respondent. Various exceptions and exceptive allegations were filed by the company, and Rogers filed a reply thereto. The court sustained some of the exceptions and granted Rogers time to file a second amended libel. He elected to stand on his pleadings, and a final decree of dismissal was entered. Rogers appeals.

Twice before related matters in this dispute have been before this court. Rogers v. Alaska Steamship Co., 9 Cir., 249 F.2d 646, ... F.2d ..... Background

facts additional to those recited herein are set out in those opinions.

In his amended libel Rogers alleged that between March 17, 1952, and December 18, 1955, he made nine voyages as a member of the stewards department on appellee's SS President Monroe. Concerning each of these voyages, Rogers alleged that appellee is indebted to him for the reasonable value of the work which he performed, less sums already paid to him by appellee for such work and less associated payments already made by appellee to certain health and welfare and pension trust funds. It was further alleged that the reasonable value of his work is equal to the wages at the basic and overtime rates actually paid plus the actual associated payments made to the trust funds,

> "adjusted upward to reflect the same percentage increases and effective dates of increase as were paid by respondent after June 19, 1952, to its unlicensed deck and engineroom department employees, and to the health and welfare trust funds and pension trust fund of which said employees were beneficiaries, for said voyage."

With regard to each voyage, and in the alternative, it was alleged in the amended libel that unless the company is required to pay Rogers the indebtedness due him, computed as indicated above, "respondent will remain unjustly enriched at the expense of libelant, contrary to all principles of equity and good conscience."

The trial court, in sustaining one of the company's exceptions, held that since Rogers was paid wages at

the rate specified in written shipping articles which he had executed, he could not state a claim for additional compensation on the basis of implied contract or unjust enrichment without alleging facts which would warrant disregard of those articles.[1]

In order to determine whether this was a correct ruling, it is necessary to review those recitals in the exceptions and exceptive allegations and in Rogers' reply thereto which bear upon this point.

It is recited in appellee's exceptions, among other things, that the libel does not state a cause of action on which relief can be granted because (a) it must be presumed, in the absence of allegations to the contrary, that the terms of employment were covered in articles, as required for foreign voyages by 46 U.S.C.A. § 564, and an action will not lie on an alleged implied contract where an express contract covers the same subject matter; and (b) the counts for unjust enrichment do not lie because the libel shows that libelant is seeking to recover for services rendered under the terms of a written contract, payment having been accepted in full satisfaction thereof as evi-

---

[1]The trial court said in the order sustaining the exceptions: "Both the contract of employment of libelant and his release upon completion of the voyage must be set aside herein under some theory before libelant can successfully recover. The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it. It is a clear rule at law that averments of this nature must be by explicit pleading (F.R.C.P. 9(b).)"

denced by the execution of a mutual release and discharge.

We shall now summarize the pertinent facts set forth by the exceptive allegations. Prior to June 19, 1952, Rogers was employed under the terms of a labor contract negotiated through collective bargaining in accordance with the Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 141-87. In April 1951 a dispute developed concerning the representation of Rogers for collective bargaining purposes. On June 19, 1952, a consent decree was issued by the United States Court of Appeals for the Ninth Circuit in connection with this representation dispute and an order of the National Labor Relations Board dealing with the dispute.

Attached to this decree as an exhibit was an outline of terms and conditions of employment of cooks and stewards. The decree provided, with the express approval of the employers, the NLRB, the National Union of Marine Cooks and Stewards, and the Marine Cooks & Stewards, AFL, that these terms and conditions would be immediately adopted and continued in effect until a union had been duly certified by the NLRB as the exclusive representative of employees in the stewards departments of the affected vessels.

Among other things, the outline provided that the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment would remain in

effect. The decree also provided that the referee appointed for the Port of San Francisco would have the power to adjudicate grievances concerning the employment of stewards department personnel.

On each voyage involved in this suit, Rogers and the master of the vessel entered into written shipping articles executed before a shipping commissioner, in which the exact wages to be paid Rogers were specified. The wage provisions corresponded to those set forth in the outline attached to the court decree, and Rogers was paid the wages specified.

In his reply to the exceptive allegations, Rogers did not, as alleged by appellee, dispute the written terms of the consent decree. He contended, however, that this decree "did not prevent, and was not intended to prevent" the company's becoming obligated to pay him "the full and reasonable value of his services."

Rogers did not deny that he entered into shipping articles as alleged for each voyage or that he was paid according to their terms. He maintained, however, that these articles "did not specify, nor were they intended to specify, the full compensation to be paid libelant for such services."

Appellant did not take advantage of the opportunity afforded him to further amend his libel to allege fraud or duress, or to present any other ground not already advanced in pleadings on which the wage terms of the shipping articles could be avoided. The only theory upon which he relied in urging disregard

of the express terms of those articles is that since unlicensed deck and engineroom department employees received certain wage increases during the time appellant's wages were frozen under the consent decree, the company impliedly agreed to give him a like increase over and above the wages specified in the decree and in his shipping articles, and will be unjustly enriched if it fails to do so.

Since this sole theory of the case was not predicated upon any factual showing beyond the allegations just summarized, only a question of law was presented, and the suit was properly adjudicated on the pleadings.

An action does not lie on an implied contract where there exists between the parties a valid express contract which covers the same subject matter. As the Supreme Court said in Klebe v. United States, 263 U.S. 188, 192 "[a] contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications." Giving application to this rule with respect to contracts implied in law as well, this court has said: "There cannot be an implied contract either in law or in fact contrary in terms to a controlling express contract." United States v. Ahearn, 9 Cir., 231 F.2d 353, 356.

Archawski v. Hanioti, 350 U.S. 532, cited by appellant, held that admiralty has jurisdiction over a libel asserting unjust enrichment. But the holding was limited to a claim of unjust enrichment arising

as a result of a breach of a maritime contract. In the case before us, no breach of contract is alleged.

Appellant argues that the rationale underlying the decision in Martin v. Campanaro, 2 Cir., 156 F.2d 127, supports his claim for recovery. But the question there involved was to determine, under the circumstances of that case, what contract "implied in fact" pertaining to wages the parties' course of conduct implied when employees continued to work as under the terms of an express contract which had expired. In the instant case, an express agreement embodied in written shipping articles specifying the full compensation to be paid was in effect during each voyage in question.

Accordingly, and without reaching other grounds relied upon by the trial court or additional grounds advanced in the exceptions and exceptive allegations, the judgment is

Affirmed.

(Endorsed) Opinion Filed June 5, 1961.
Frank H. Schmid, Clerk.

In The District Court of The United States
for The Northern District of California,
Southern Division

No. 27278

In Admiralty

John J. Rogers, et al.,
Libelants,

vs.

Alaska Steamship Company, et al.,
Respondents.

FINAL DECREE OF DISMISSAL

This action having duly come on to be heard in its regular order on the 1st day of February, 1960 upon motion that the action be dismissed, the seamen named as libelants being represented herein by proctor Allan Brotsky, Esq. and proctor Rubin Tepper, Esq. of Messrs. McMurray, Walker & Tepper, and respondents Matson Navigation Company, The Oceanic Steamship Company, and Oliver J. Olson & Co. being represented by proctors Alvin J. Rockwell, Esq. and John M. Naff, Jr., Esq. of Messrs. Brobeck, Phleger & Harrison and respondent Coastwise Line being represented by proctor Richard Ernst, Esq. and respondent American President Lines, Ltd. being represented by

Proctors Peter N. Teige, Esq. and George D. Wick, Jr., Esq. and respondent Grace Line, Inc. being represented by proctors William R. Ray, Esq. and Maynard Garrison, Esq. of Messrs. Wallace, Garrison, Norton & Ray and respondents American Mail Line, Pacific Far East Lines, Pacific Atlantic Steamship Co., Pacific [226] Transport Lines, States Steamship Co., Pacific Argentine Brazil Lines and Pope & Talbot, Inc. being represented by proctors James L. Adams, Esq. and Gary J. Torre, Esq. of Messrs. Lillick, having been argued and duly submitted for decision Geary, Wheat, Adams & Charles, and the matter and the Court having considered the entire matter, including the previous orders of this Court dated November 16, 1956, February 12, 1957, February 5, 1959, May 6, 1959, July 17, 1959, and December 30, 1959, and the Court after due deliberation, having determined:

> The Second Amended Libel filed on January 14, 1960 does not tender any claims by the original four libelants either in their own behalf or in a representative capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants some 600 seamen whom the four original libelants had previously sought to represent and names as respondents many shipping companies not heretofore named.
>
> Thus the Second Amended Libel not only improperly joins causes of action arising out of unrelated contracts of employment, but also comes too late. All of the information required to pre-

> sent the claims of the 600 seamen as they are now presented has been available in the records of the Coast Guard since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libelants have been apprised of the limitations inherent in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel in their own behalf.

And the Court having entered in writing its Order Granting Motion to Dismiss.

This Court hereby expressly determines that there is no just reason for delay in the entry of a final decree as to all seamen named as libelants in the Seamen's Libel in Personam or in the Second Amended Libel in Personam and as to all respondents named in the Seamen's Libel in Personam or in the Second Amended Libel in Personam, with the exception of the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959.

Now therefore it is ordered, adjudged and decreed that the claims of John J. Rogers on his own behalf against [227] the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959, be, and they hereby are, severed from this action; and

It is further ordered, adjudged and decreed that this action be, and it is hereby, dismissed as to all seamen named as libelants in the Seamen's Libel in Personam

or in the Second Amended Libel in Personam and all respondents named in the Seamen's Libel in Personam or in the Second Amended Libel in Personam, but this dismissal shall not affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., that have been severed from this action and which are the subject matter of the separate libel filed on March 19, 1959; and

It is further ordered, adjudged and decreed that the Clerk of this Court is expressly directed to enter this final decree dismissing this action as to all said seamen and all said respondents but this entry shall in no way affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd. that have been severed from this action; and

It is further ordered, adjudged and decreed that all sureties for cost that might be assessed against respondents other than the American President Lines, Ltd. are hereby released, discharged and exonerated.

Dated: February 16, 1960.

United States District Judge
/s/ LOUIS GOODMAN

[Endorsed]: Filed Feb. 16, 1960. C. W. Calbreath, Clerk. (Entered 2-17-60.)

[228]

In the United States District Court for the
Northern District of California,
Southern Division

John J. Rogers, et al., Libelants, vs. American President Lines, Ltd., et al., Respondents.	In Admiralty No. 27278

ORDER SUSTAINING EXCEPTIONS TO
AMENDED LIBEL

Libelant, a seaman in the stewards department, has filed a libel in personam "for wages under general maritime law". The amended libel with which we are here concerned contains eighteen counts, all of which are framed as common counts, the odd numbered counts beginning with Count 1 being based on quantum meruit for the reasonable value of services rendered by libelant, each count on a specific voyage, and the even numbered counts beginning with Count 2 restating the claim for the difference between what libelant received for his services and the reasonable value of such services; these counts are based on unjust enrichment implied in law theory.

The parties, in oral argument and in numerous briefs filed herein during the progress of this litigation, admit that this seaman, on each voyage, signed

articles which clearly constitute a written contract of employment, and at completion of the voyage written releases were executed. Both of these writings were executed in accordance with laws of the United States passed for the purpose of protecting the seaman. In addition, the court may take judicial notice of the fact that this seaman, serving in the steward's department, worked under a consent decree of the Court of Appeals for the Ninth Circuit entered in the case of *National Labor Relations Board v. Pacific American Shipowners Association, etc.,* Number 13,386 in the files of the Court of Appeals.

On their face, the common counts upon which libelant relies do not satisfy the requirements of Rule 22 of the Supreme Court Admiralty Rules. Common counts arising from the common law are allowed as statements of legal conclusions, they never constitute statements of fact. Admiralty does not have a common law background and under Rule 22 of the Supreme Court Rules a libel shall "propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit." In the instant case libelant argues that his pleadings adequately state libelant's claim and apprise respondent sufficiently of the nature of his claim without setting forth facts beyond the mere conclusions therein stated.

This can not be, for in this case these common counts, when considered together with the admitted facts and those of which this court can take judicial

notice, that a written contract and a written release exist, that these agreements are of a type required by and executed in accordance with the laws of the United States, do not properly state a cause of action. Both the contract of employment of libelant and his release upon completion of the voyage must be set aside herein under some theory before libelant can successfully recover. The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it. It is a clear rule at law that averments of this nature must be by explicit pleading. (F.R.C.P. 9(b).)

Thus it will be seen that even at law libelant's pleading is defective; certainly then in admiralty this pleading can not meet the more stringent test of Rule 22.

Under these circumstances respondents' exceptions to the amended libel filed herein on March 19, 1959, are sustained. Libelant is hereby granted thirty days to file a second amended libel herein.

Dated: May 31, 1960.

/s/ Albert C. Wollenberg
United States District Judge.

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

No. 13,386

National Labor Relations Board,
Petitioner,

vs.

Pacific American Shipowners Association, Pacific Maritime Association, Alaska Steamship Company, American Mail Line, Ltd., Pope & Talbot, Inc., and National Union of Marine Cooks & Stewards,
Respondents.

Consent Decree

Petitioner herein having entered its decision and order in Case Nos. 19-CA-186, et al, and 19-CB-46 et al, on March 12, 1952, and having filed, on May 16, 1952, its petition for enforcement of that order, and having filed, on May 20, 1952, its motion for restraining order; respondent National Union of Marine Cooks and Stewards having filed, on May 19, 1952, its motion for an order staying the order of petitioner; employer respondents having filed, on May 19, 1952, a motion for appropriate temporary and declaratory relief, temporary restraining order, clarification and

specific instructions; the Court on May 20, 1952, having heard argument by counsel for all parties herein and opportunity having been afforded counsel for Seafarers International Union of North America—AFL, and its affiliate, Marine Cooks and Stewards—AFL, to be heard at such time and place; the entry of this decree having been consented to by the parties who have appeared in this proceeding and are directly affected hereby, the acts that gave rise to petitioner's order and this proceeding having occurred within this circuit and this Court having jurisdiction in the matter, and the Court being fully advised and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Respondent Pacific Maritime Association, successor and assign of the Respondent, Pacific American Shipowners Association, its officers, agents, successors and assigns shall,

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of the employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with them concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to their contract of December 2, 1948, with National Union of Marine

Cooks and Stewards, or to any modifications, extension, supplement, or renewal thereof, or to any other contract agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents its members from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of the employees of their members, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of the employees of their members, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any employees (including applicants for employment) of its members, except to the extent authorized by Section 8 (a) (3) of the Act; and

(5) In any other manner interfering with, restraining, or coercing employees of their members in the exercise of the rights guaranteed them in Section

7 of the Act, or the right to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of the employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with them concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Post at its offices copies of the notice attached hereto and marked Appendix C. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by its representatives, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to the stewards department employees of its members are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(3) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from

the date of this Order, what steps it has taken to comply herewith.

2. The Respondent, Pope & Talbot, Inc., its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, ex-

cept to the extent authorized by Section 8 (a) (3) of the Act;

(4) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix D. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(3) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

3. The Respondent, American Mail Line, Ltd., its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of em-

ployment, unless and until said organization shall have ben certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of its employees, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of its employees, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any of its employees or applicants for employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(5) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Offer to Thomas J. Howard immediate stewards department employment, without prejudice to his seniority or other rights and privileges and, if no such positions are presently available, place him upon a preferential hiring list and thereafter offer him employment as it becomes available, in the manner provided for hereinafter in the Outline of Terms and Conditions of Employment of Cooks and Stewards;

(3) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix E. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

4. The Respondent, Alaska Steamship Company, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or renewals thereof, for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which ex-

pressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of its employees, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of its employees, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any of its employees or applicants for employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(5) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any sup-

plements or renewals thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Offer to all the employees named in Appendix A hereto, except Campbell and Responte, immediate and full reinstatement to their former or substantially equivalent positions, and to all the employees named in Appendix B hereto, except Campbell, Theusen, Responte, Siebert, Paige, Makemson, Bailey and Lantz, immediate stewards department employment without prejudice to their seniority or other rights and privileges; and, if no such positions are presently available, place them upon a preferential hiring list and thereafter offer them employment as it becomes available, in the manner provided for hereinafter in the Outline of Terms and Conditions of Employment of Cooks and Stewards;

(3) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix F. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

spondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

5. The Respondent, National Union of Marine Cooks and Stewards, its officers, representatives, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Performing or giving effect to its contract of December 2, 1948, with Pacific American Shipowners Association, and its employer members or successors, or to any modification, extension, supplement or renewal thereof, or to any other contract, agreement, or understanding affecting employees covered by the aforementioned contract entered into with said employers as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it shall have been certified by the Board;

(2) Causing or attempting to cause the aforementioned employers, their officers, agents, successors or assigns, to discriminate against their employees or applicants for employment in violation of Section 8 (a) (3) of the Act; and

(3) In any other manner restraining or coercing employees of the aforementioned employers, their successors or assigns, in the exercise of the rights

guaranteed them in Section 7 of the Act, or the right to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Notify American Mail Line, Ltd., in writing, and furnish copies to the employee involved, that it has no objection to the employment of Thomas J. Howard, and notify Alaska Steamship Company in writing, and furnish copies to the individuals involved, that it has no objection to the employment of the employees named in Appendix A and Appendix B hereto, except Campbell, Responte, Theusen, Siebert, Paige, Bailey, Makemson, and Lantz;

(2) Notify Alaska Fishermen's Union, in writing, and furnish copies to the employees involved, that it has no objection to the clearance for employment of the individuals on its April 11, 1949, letter to that union;

(3) Post in conspicuous places at its hiring halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked Appendix G. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it im-

mediately upon receipt thereof, and maintained for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(4) Mail to the Regional Director for the Nineteenth Region signed copies of the notice attached hereto as Appendix G, for posting, the members of Pacific American Shipowners Association and Pacific Maritime Association who are parties to the December 2, 1948, contract willing, at their respective offices and in the stewards department of all vessels operated by them, in places where notices to employees are customarily posted. The notices shall be posted for a period of sixty (60) consecutive days thereafter. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall after being signed as provided in paragraph 4 (b) (3) of this Order, be forthwith returned to the Regional Director for said posting; and

(5) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

6. The Outline of Terms and Conditions of Employment of Cooks and Stewards attached hereto as Appendix H shall be immediately adopted, put into effect, and continued in effect until a union has been duly certified by the National Labor Relations Board as the exclusive representative for collective bargain-

ing purposes of employees in the stewards department of vessels covered thereby.

7. This Court will appoint a referee for the Port of San Francisco and such additional referees as may be necessary. Such referee or referees shall have the power of finally adjudicating any and all disputes that may arise in connection with the execution or administration of the provisions for hiring of men and filling vacancies (Appendix H, paragraph 4) and of generally supervising the registration and hiring procedures set forth therein so as to accomplish the objective of removing any impairments to the conduct of a free and impartial election that may be ordered by the petitioner, in pursuance of the National Labor Relations Act, for the purpose of selecting and certifying an exclusive representative for collective bargaining purposes of employees in the stewards departments of vessels covered by such terms and conditions of employment. The referee appointed for the Port of San Francisco shall have, in addition to the powers hereinabove conferred, the power to adjudicate any grievance arising out of the employment of stewards department personnel and submitted to him under the terms of paragraph 3 of said outline of terms and conditions of employment.

8. The Clerk of this Court shall promptly cause an estimate to be made of the compensation and expenses of the referee or referees and shall notify the Pacific Maritime Association of the amount of his estimate, which amount shall be paid to the Clerk by said Pacific Maritime Association. From time to time

thereafter as may be necessary the Clerk shall make supplementary estimates and such amounts shall be paid to the Clerk. Upon certification of an exclusive bargaining representative for stewards department personnel covered by said outline of terms and conditions of employment the affairs of the referees shall be wound up and, after all costs of compensation and expense of the referees have been paid, the Clerk will refund to said Association any sums deposited and not so used.

The entry of this decree having been voluntarily consented to, and persons having been and being reinstated and employed in order to eliminate possible future back-pay liability,

It Is Further Ordered, Adjudged and Decreed that the petition for enforcement, insofar as it relates to the provisions of petitioner's order calling for back-pay is hereby withdrawn without prejudice. The entry of this decree and such reinstatement is without prejudice to the rights of respondents to present any and all defenses going to the existence of any liability for back-pay or the amount thereof; and such defenses shall be hereafter available to respondents with like force and effect as though this decree had not been entered.

Clifton Mathews
Homer T. Bone
William E. Orr

The undersigned consent to the entry of the foregoing decree.

National Labor Relations Board
David Karasick,
Attorney NLRB

Pacific American Shipowners Assn.
Pacific Maritime Association
Alaska Steamship Company
American Mail Line, Ltd.
Pope & Talbot, Inc.
J. Paul St. Sure

National Union of Marine Cooks & Stewards
Allan Brotsky

Marine Cooks & Stewards—AFL
Affiliated with Seafarers International Union of North America—
John Paul Jennings

(Appendices A, B, C, D, E, F and G omitted.)

Appendix H

Outline of Terms and Conditions of Employment of Cooks and Stewards

1. In accord with the Board's order, the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment with preference as stated herein shall remain in effect and employees shall continue to have any rights that they may have acquired under the pre-existing contract and its supplements and amendments.

2. *As to access to ships by union representatives.* Equal treatment will be accorded to representatives of the contending unions. A reasonable and equal number of passes will be issued to representatives of each union with the customary release from liability on account of personal injury, and so forth, that may occur while they are aboard ship.

3. *Grievances.* Grievances may be presented by any employee. He may at the outset of each voyage or thereafter designate a delegate from among the ship's stewards department to represent him for the handling of any grievances aboard ship. He may consult in port with a representative of any union regarding the case. He may have such representative present, or assist in the presentation of, his case to the company representative. If the adjustment of the grievance at this step is unsatisfactory, the individual may appeal to a Port Committee step by designating

the Port Committee of a stewards department union as his representative. Appeal to the Court appointed referee is the final, or arbitration, step, where an individual may be represented by a representative of the union he has designated.

4. *Exclusive method for hiring of men and making replacements among stewards department personnel of the Companies.*[1]

(a) A central office shall be established in each port to register and clear applicants for stewards department employment and to refer applicants for employment through maritime union hiring halls or directly. These central offices shall be established and operated by the Association. The companies shall hire stewards department personnel and fill vacancies among such personnel exclusively through these central offices and in accordance with the procedure prescribed herein. A man may be registered at only one port.

(b) Initial registration will be accepted from any person who personally appears at the central registration office and is in the pool of PMA stewards department personnel, which shall be shown if he presents when so registering, (1) validated papers for stewards department ratings issued prior to April 1, 1952, or waiver thereof, and (2) evidence that he has been employed previously in stewards department

[1]As used herein, "stewards department personnel" or "stewards department employees" include all stewards department employees with the exception of concessionaries or their employees, chief stewards of passenger ships Class A and Class B, doctors, doctors assistants, food controllers, auditors of supplies and nurses.

ratings on one or more ships operated under agreement of Pacific Maritime Association or its predecessor since December 2, 1946; provided that: Registration will also be accepted from any person who presents the evidence in (b) (1) above and who, in lieu of requirement (b) (2) above, presents evidence that he was named on a charge filed with the National Labor Relations Board between December 2, 1946, and June 6, 1952, inclusive, charging MCS with having caused a PMA member company to discriminate against him in hiring in the stewards department in violation of Section 8(b) (2) of the Act, and/or charging any PMA member company with discriminating against him in hiring in the stewards department in violation of Section 8(a)(3) of the Act. A person so registered shall be entitled to have his name included on the master list hereinafter mentioned but shall not be entitled to referral to a job or employment until and unless the referee determines after investigation or hearing which substantiates by reasonable proof that such person was denied opportunity to fulfill requirement (b)(2) above because of discriminatory practices of a nature prohibited by Sections 8(b) (2) or 8(a) (3) of the Act. If the referee determines to the contrary, the name of such person shall be stricken from such master list.

(c) Registration shall commence in each port upon the appointment of a referee, but not sooner than June 23, 1952, and shall continue from June 23 to June 27, inclusive, or for five weekdays after registration commences, if it commences later than June

23. Dispatching from the central office hereunder shall commence in each port on June 30, 1952, after the completion of the revised master list as provided in (d) hereof, or as soon thereafter as the revised master list has been completed. Any man on in-patient status at a marine hospital during the initial registration period may send in a registration card and be placed tentatively on the initial master list. He may not, however, participate in the revision provided for in (d). Within two days of his discharge from in-patient status at a marine hospital he must appear at the central office and complete his registration, presenting at that time his discharge from the hospital and the material required under 4(b). Upon so timely satisfying 4(b) his tentative registration shall be validated into full registration. Should he fail to satisfy 4(b) within the two day period his tentative registration shall be cancelled.

(d) After the period of initial registration at the central office has been completed, a master list of all registrants will be prepared with one series of central office registration numbers. The names of the initial master list shall be drawn by lot. The initial registrants shall be entitled to retain their places on such list for job assignment in the manner hereinafter set forth; provided, however, each man who has designated either union hiring hall under sub-paragraph (h) may have his positions on the master list adjusted so that as among those making such arrangement, he will appear on the master list in the sequence of the time and date of his current registration

for shipping at such union hiring hall. If men designating either hall decide to make such a rearrangement of central office registration numbers, the union shall communicate this decision to the central office on the day after receipt of the initial master list, sending therewith the list of all men making such arrangement and their revised registration numbers and dates and times of current registration at this union hiring hall to confirm such revision. Such notice and list shall be posted at such hall and the central office immediately. The revised master list will thus be made in advance so that any man claiming he has been given an improper registration date or time may challenge his position as shown on the list by direct appeal to the referee. The referee shall have power to determine his challenge and make any necessary change in his position on the list.

(e) After the closing of the initial registration period, any person may register who shows he is in the pool of PMA stewards department personnel by presenting when registering the material required by paragraph 4 (b). Each such registrant shall be placed on the master list in sequence based on the time of his central office registration. The central office will also take applications beginning one week after the close of the initial registration period—from persons not satisfying 4 (b) (2) for places on a separate list of non-registrants to be used to fill jobs that cannot be filled under the 4 (j) procedure. Such applications shall be effective for 60 days but may be revalidated during the last five days of the effective

period upon appearing at the central office and requesting revalidation. Such applications shall be kept in sequence based on the date and time of initial application.

(f) Each registrant, at the time of each registration, shall signify the rating or ratings he holds and the rating or ratings (not more than three) under which he desires to sail. Lists shall be prepared and maintained in each port for each rating with the names of the registrants desiring to sail therein arranged in the master list sequence.

(g) Any employee now or hereafter employed may continue his employment provided the employer and the employee desire such continuance. Upon separation from employment any such employee may register at the central office by appearing and presenting the material required by paragraph 4(b). Such registrants shall be placed on the ratings lists in sequence based on the time of such central office registration.

(h) Upon the completion of the final assignment of the master registration numbers and thereafter at the time of registration, each man shall receive a time clock stamped registration card from the central office bearing his number. He shall thereafter be entitled to referral on the basis of such number. Each applicant must designate a place through which he can be assigned to a job. If he chooses, an applicant may designate the hiring hall of any maritime labor union. However, membership in a union or in any particular union will not be a condition of employment. No applicant will be discriminated against by

virtue of either membership or non-membership in a union or in any particular union or activity or non-activity for or against any union. Men will be assigned to jobs during shipping periods beginning at 9:00 and 11:30 A.M. and 1:00 and 4:00 P.M. each day. The central office will notify the hiring halls in advance of the jobs to be filled. The hiring halls will be immediately advised of the conclusion of the shipping period. Men who have not designated the hiring hall of any maritime labor union shall be assigned to jobs directly by the central office by telephone during the same shipping periods. Jobs may be assigned outside these shipping periods in emergency. Non-availability at the hiring hall or other place at the time the job is called during specified shipping periods shall constitute refusal of the job.

(i) Registrants entitled to referral shall be referred to job opportunities by the central office in rotation based on the sequence of job orders from the employers and the sequence of registration on the lists of employees.

(j) Should any job be rejected by all available registrants on the master list for a particular rating, the job will be assigned to all registrants on such list who have been registered for 46 days or more in the order in which their names appear on such list and each of such registrants who declines to accept the same or is unavailable shall have registration for all ratings cancelled and he must reregister at the bottom of the list. Any person accepting a referral who is rejected by the employer shall retain his position on

the central office list provided that he promptly reports his rejection to the central office. A person who has accepted a referral and fails to take the job for any reason other than rejection by the employer must on his next referral accept the job or shall lose his registration for all ratings and must reregister at the bottom of the central office list.

(k) (1) Any person who is *now* off a ship for the current trip on a "trip-off" basis and whose position is being filled by a relief man shall have a preference to return to the job at the end of the current trip either if the company's records show the man now working is a relief man or if the relief man leaves the vessel voluntarily. Each person now so off a ship shall not later than the day prior to the ship's arrival in port, file written notice at the central office of the particular job he claims, indicating the ship, the rating, and the date and reason (medical, vacation, company leave of absence, personal) he was relieved.

(2) Hereafter this preference shall be effective only where the reason for seeking relief is medical, vacation or company leave of absence and when the man wishing to hold the preference registers at the central office for reshipment to the particular job so left within 24 hours of so leaving his ship. Those who leave for medical reasons that make such registration in person impossible may so register by proxy within the period provided.

(3) A person so registered may not register for other employment and shall lose his preference if he registers for general shipping.

(4) A man who takes advantage of this preference must claim it for the next following trip by reporting at the central office not later than the day prior to the ship's arrival in port to obtain an assignment slip to the ship. The time for exercising the preference may be extended upon approval of the employer and notice thereof to the central office.

(l) The central office shall mail daily and simultaneously to each union (a) a list of men registered showing the registration number of each and the ship, voyage, dates and rating shown on the discharge he presented to satisfy 4 (b), and (b) a list of men dispatched, showing each man's name, the rating and the ship. A copy of the initial master list and of the revised master list shall be transmitted to each union upon its completion. Each union may have one observer present in the central office during the initial registration period, when he may examine the discharges presented, and while the names are drawn by lot as provided in (d).

(m) Anyone employed on a ship when picketed or laid up for not more than ten (10) days has the right, if promptly exercised to return to such employment on resumption of stewards department operations on the ship and continue therein as provided in 4(g) above. Neither registration at the central office nor dispatch in accordance with the foregoing procedure is necessary for such a person to return to such employment. This preference shall extend to those who would have been or become entitled to reship under 4(k).

5. Reinstatement of persons as provided in the order of the Board shall be made in accordance with the terms of said order irrespective of any other provision for initial registration or hiring provided for herein.

6. *Referee.* The panel of judges of the United States Court of Appeals for the Ninth Circuit, to which case No. 13386 is assigned, has been requested to name a referee for each major port to have the authority and powers stated herein. The Association will absorb all costs of compensation and expenses of the referee or referees. It will, in advance, deposit with the clerk of this Court the sum which he estimates is needed for such costs, and shall from time to time thereafter deposit additional sums in accordance with supplementary estimates of the clerk.

The referee shall determine the claims of men who are permitted to register under the 4(b) proviso, any dispute as to an individual's registration number on the final revised master list, any dispute that may arise when a man claims he was or is on a trip off, any dispute that may arise when a man claims he was an employee on a ship picketed or laid up, any dispute as to a man's qualifications for a position when the ship operator has refused to employ the applicant referred and any dispute as to the registration or referral of men in accordance with the procedures set forth herein.

The referee shall dispose of issues presented to him as quickly as possible to avoid or minimize delays in shipping of men. He need not hold formal hearings

except where acting under the grievance procedure, but shall require that affidavits or sworn statements be filed as to the facts. The unions and PMA shall have reasonable opportunity to present relevant evidence by affidavit or sworn statement.

The referee appointed for the Port of San Francisco shall have the power, in addition to those set forth above, to act as arbitrator under the grievance procedure set forth in paragraph 4.

The referee's determination of any dispute as provided herein shall be final and compliance therewith shall be deemed compliance with the Board's order and the Consent Decree entered in Case No. 13386 but such determination shall not be binding on the Board or otherwise encroach on its exclusive and original jurisdiction respecting any unfair labor practice charges that have been or may hereafter be filed with the Board based on such dispute or the circumstances giving rise to the same.

7. This outline of terms and conditions of employment of cooks and stewards may be implemented by additional shipping rules issued by Pacific Maritime Association after submission to and approval by the Board, National Union of Marine Cooks and Stewards and Marine Cooks and Stewards, AFL, affiliated with Seafarers International Union of North America, AFL.

(Endorsed) Filed June 19, 1952.

Paul P. O'Brien, Clerk.

(Endorsed) Filed May 3, 1956.

C. W. Calbreath, Clerk.

[Title of Court and Cause]

ORDER

Exceptions and exceptive allegations having been filed to the libel in the above-entitled cause by various respondents and having regularly come on for hearing on the 8th day of May, 1956, libelants being represented by Allan Brotsky, Esq., respondent American President Lines, Ltd. being represented by Peter N. Teige, Esq., respondents Matson Navigation Company, The Oceanic Steamship Company and Oliver J. Olson & Co. being represented by Messrs. Brobeck, Phleger & Harrison by Alvin J. Rockwell, Esq., respondent Coastwise Line being represented by Richard Ernst, Esq., respondent Grace Line, Inc. being represented by Messrs. Wallace, Garrison, Norton and Ray by William R. Ray, Esq., and respondents American Mail Line, Pacific Transport Lines, Inc., States Steamship Company, Pacific-Atlantic Steamship Co., Pacific Far East Line, Pope & Talbot, Inc. and Pacific [76] Argentine Brazil Line being represented by Messrs. Lillick, Geary, Wheat, Adams & Charles by Gary J. Torre, Esq., and the respective proctors having been heard in support of and in opposition to said exceptions and exceptive allegations, and the matter having been briefed and duly submitted for decision, and the court having filed on the 16th day of November, 1956 an order sustaining certain of said respondents' exceptions to the libel herein, reserving ruling on the exception which raises the question of laches and on the exceptive allegations concerning the shipping articles and releases, and directing that a further order be prepared and libelants having thereafter

filed a motion to consolidate libelants' causes of action and a motion for reconsideration and request for ruling together with affidavits in reference thereto and the motions having been presented in open court and argued by libelants and respondents on the 7th day of February, 1957 and the Court having reconsidered the entire matter and good cause appearing therefor:

It is hereby ordered that Counts Three and Four of the libel herein be, and the same hereby are, dismissed; and

It is further ordered that the exceptions of said respondents, with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same hereby are sustained; that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may [77] sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to represent in this action, but not otherwise; and

It is further ordered that libelants' motion to consolidate libelants' causes of action and libelants' re-

quest for ruling may be, and the same hereby are, denied.

Dated: February 12, 1957.

/s O. D. HAMLIN
United States District Judge

[Endorsed]: Filed Feb. 12, 1957. C. W. Calbreath, Clerk. [78]

United States Court of Appeals
for the Ninth Circuit

John L. Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 15,556 Oct. 29, 1957

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before ORR, LEMMON, and FEE, Circuit Judges.

LEMMON, Circuit Judge.

Salutary though it be, the rule that generally only final judgments are appealable in Federal courts is frequently overlooked by even experienced counsel.

It is salutary, because it protects the courts and the parties themselves from the delays, inconveniences, and frustrations incidental to piecemeal appeals.

It is overlooked, because counsel, impatient to get into a higher court, often prematurely seek appellate review.

The temptation to seek such review seems to be especially strong in the prosecution of class suits.

Such, at least, appears to have been the situation in the instant case.

1. *Statement of the Case*

For a period of more than three years ending in October, 1955, the steward's department employees of more than thirty steamship companies on the West Coast worked in accordance with the terms of a Consent Decree of this Court, filed on June 19, 1952. The instant case is a sequel to that decree.

In the libel filed in the District Court, about 400 seamen sought to recover the difference between the compensation paid them while they worked during the period of the Consent Decree, and "the reasonable value of their services". The appellants complain that they were not being "paid the equivalent of the raises received by employees in other comparable work categories" who were not paid under the Consent Decree. In the present posture of the case, however, the details of the libelant's grievances are not relevant.

Four of the seamen-claimants became the named libelants in the instant suit. They were authorized by the remaining hundreds to represent them, in their individual claims for specific amounts of wages due each. All of the companies were joined as respondents, thirty-three in number.

The libel contained four counts, which may be briefly summarized as follows:

Count One prayed for the wages due the respective seamen on a *quantum meruit* theory.

Count Two sought recovery of the same amounts because of the appellees' "unjust enrichment".

Count Three and Count Four dealt with the contributions alleged to be owed by the appellee companies not to the seamen individually but to welfare and pension trust funds. The libelants set out these latter two counts "for and in behalf of themselves and for and in behalf of the approximately 4,000 other seamen similarly situated" during the crucial period already mentioned. More specifically—

Count Three based its class demands upon the *quantum meruit* theory.

Count Four was bottomed upon "unjust enrichment".

Numerous "exceptions and exceptive allegations" were filed by the appellees. We need consider only those that were sustained by the District Judge, since the appellees have filed no cross-appeal.

On November 16, 1956, the District Judge made an order denying the motion to dismiss the first two counts, and granting the motion to dismiss the third and fourth counts. In that order, the Court said:

> "The causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent if they served together on the same voyage or voyages. Any one of the four named libelants may sue on behalf of any one of the

four hundred whom they seek to represent if those represented seamen served on the same voyage or voyages with them."

Regarding Counts Three and Four, the Court ruled:

"We have been shown no authority which authorizes a class suit as is attempted in the third and fourth counts of this libel. . . . The exception as to the class action should be sustained and the motion to dismiss should be granted as to the third and fourth counts."

Ruling further with respect to Counts One and Two, the District Judge, after repeating his previous order of dismissal as to Counts Three and Four, on February 12, 1957, held as follows:

". . . the exceptions of said respondents (appellees), with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same are hereby sustained; *that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim,* with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to present (sic) in this action, but not otherwise."

Notice of appeal from this order of February 12, 1957, was filed by the appellants on February 27, 1957.

In June and July, 1957, several of the appellees filed notices that on July 8, 1957, they would move this Court to dismiss the appeal. On the latter date, time for the filing of briefs was granted to July 18, 1957, on which date the cause stood submitted.

It is the motion to dismiss the appeal that we are now considering.

2. *The Appellants Themselves Point Out That the Rulings of the District Court Went to the "Form" and Not to the "Merits" of the Appellants' Claims.*

In limine, it should be noticed that the appellants themselves concede that the problem now before us is one of form and not of substance. At the very outset of their memorandum filed in this Court, they state:

> "It is the form of (the appellants') pleadings, and not the merits of their claims, which occasioned the rulings of the District Judge which are the subject of the present appeal."

Perhaps sensing the dangerous impact of such a concession, the brief-writer hastens to add:

> "As is so often the case with procedure, the forms by which the seamen-claimants here asserted their claims went to the nub of their ability effectively ever to do so."

While we do not desire to decide this case upon the unguarded concession of one of the parties, we do

believe that the first statement quoted above should be considered by us, *inter alia,* as one that can "set down the pegs that make this music".

3. *As to Counts One and Two, the Order is Palpably and Demonstrably Not Final and Therefore Non-Appealable.*

In discussing the effect of the Court's order as to Counts One and Two, the appellants concede "that the District Court did not expressly dismiss the parties and causes", but they add:

> "Where the effect of a court's order is to dismiss a cause, no express dismissal is necessary to make the order appealable."

As we have seen, the District Court not only did *not* "dismiss the cause", either "expressly" or in "effect", but was careful to leave the gate not merely ajar, but wide open! In fact the District Judge did everything short of actually pushing the appellants through the yawning portal when, as we have also noted, he meticulously *instructed* them how to take their second bite at the forensic cherry.

In Collins v Miller, 1920, 252 U.S. 364, 370, erroneously cited by counsel for the appellee Coastwise Line as appearing in *253* U.S., the Court said:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must not only be final, but complete. (Many cases cited.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole

subject-matter and as to *all* the causes of action involved. (Cases cited.)" (Emphasis supplied.)

The teaching of *Collins* was followed by this Court as recently as December 19, 1956, when, in Howard Terminal v United States, 9 Cir., 1956, 239 F.2d 336, 337, we said:

> "In dealing with decisions of the district courts in cases involving multiple claims or grounds or causes of action in which the court disposes of some claims and reserves action upon others, it has long been the rule that the judgment to be appealable 'should be final not only as to all the parties but as to the whole subject-matter and as to all the causes of action involved'. (Quoting *Collins* v *Miller,* supra.)"

4. *That Part of the Court's Order Dismissing Counts Three and Four, Since It, Too, Goes to the FORM and Not to the Merits Of the Basic Controversy, Is Not Appealable.*

The District Judge, as we have seen, dismissed Counts Three and Four, not on the merits, *but on the "class suit"* form to which the appellants had resorted. The Court merely said that he could find nothing in the books "which authorizes a class suit," etc.

Here again the District Judge did not close the forensic door in the faces of the seamen. In the order of November 16, 1956, in considering "the question of whether one or more seamen may sue on behalf of other seamen similarly situated," the Court, after citing numerous decisions, observed:

"These cases require that the libeling seaman have written authorization from those whom he seeks to represent. Such authorization is present in this case (as to Counts One and Two). Therefore, the four named libelants may sue on behalf of those from whom they have authority to do so, if the named libelant and those from whom he has *such written authority* sailed on the same voyage or voyages together." (Emphasis supplied.)

In their contention that this Court has jurisdiction of their appeal in so far as it relates to Counts Three and Four, the appellants rely upon 28 USCA §1292(3), which reads as follows:

"*§1292. Interlocutory decisions*

"The courts of appeal shall have jurisdiction of appeals from:

* * *

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

The "rights and liabilities" referred to in the above subsection are *substantive* in nature—not adjective, tactical, or procedural. This was recently emphasized by Judge Medina in the case of In re Wills Lines, 2 Cir., 1955, 227 F.2d 509, 510, certiorari denied, 1956, 351 U.S. 917:

"When, by amendment in 1926, certain interlocutory appeals were permitted in admiralty cases, it was not contemplated that the dockets

> of appellate courts in the federal system should be burdened with all the odds and ends of interlocutory orders, most or all of which would in any event be reviewable on an appeal by an aggrieved party from a final decree. It has been repeatedly held, in this Circuit and elsewhere, that interlocutory decrees 'determining the rights and liabilities of the parties to admiralty cases' means deciding 'the merits of the controversies between them'. (Many cases cited.)"

In All American Airways v Elderd, 2 Cir., 1954, 209 F. 2d 247, 248, 249, the Court observed that "There is perhaps something anomalous in apparent legal participation in a lawsuit by persons unnamed and unidentified as individuals who, unless they show themselves by intervening, remain legally unaffected by any action taken in the case." We share that Court's apparent disinclination to encourage such a type of action, and we most certainly agree with its concrete holding:

> "In any event the non-appealability of the order (dismissing certain counterclaims as to so-called "related [but unnamed] defendants") in this type of class action is apparent."

5. *There Is No Merit to the Appellant's Cry of "Congestion".*

We need not spend much time upon the appellants' plea that the District Court's ruling as to Counts One and Two "has required the filing of thousands of separate libels," etc., and that "this Court should consider the clogging of the admiralty docket," etc. Cer-

tainly at this stage of the proceedings, we are not called upon to rule upon objections of that kind. When the case comes to us on final appeal, we may wish to consider that phase of the matter, but not now, by what the appellee properly terms "an extraordinary interference by this Court in the District Court's discretion in fixing the details of its procedures by rulings as to form of pleadings."

The appellants ask that, if the order appealed from is considered non-appealable, "this Court should treat the appeal as a petition for writ of mandate, and hear the matter on the merits". We do not believe that the situation here presented calls for the granting of any such peremptory writ. As was said in Balboa Shipping Co. v Standard Fruit & Steamship Co., 2 Cir., 1950, 181 F.2d 109, 110:

> "It is true that if decision on the merits goes against libellant and if on appeal the district court's order with respect to the amended libel should be reversed, much time and money will have been futilely expended. But in the absence of statutory relaxation of the present rules on appealability, that practical consideration cannot alter the inevitable conclusion here."

With that view we unreservedly agree.

We also consider apposite the following observation in an article appearing in the Stanford Law Review of December, 1953:

> "The class suit is dangerous, however, for the very reason that it is useful—it deprives potential litigants of their day in court. Holding a

> 'class' of persons bound by a proceeding in which only a few need be made parties can effect sweeping economies of litigation. But it can also mean a drastic invasion of the rights of those affected, particularly where they are without notice or opportunity to intervene."[1]

6. *Conclusion*

Accordingly, since the order of February 27, 1957, from which the present appeal has been taken, was not a final judgment, the appeal is hereby Dismissed.

(Endorsed:) Opinion. Filed Oct. 29, 1957.

Paul P. O'Brien, Clerk.

---

[1] "Class Actions and Interpleader: California Procedure and the Federal Rules." Volume 6, Number 1, Page 120.